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March 23, 2022

TO: Managing Director Formby

FROM: Council Chair Tommy Waters

RE: Clarifying the State and Local Fiscal Recovery Funds (SLFRF) Committee and First Tranche of ARPA Monies

Dear Managing Director Formby:

I am providing this memo to address the State and Local Fiscal Recovery Funds Committee (SLFRF).

At the time of filing my memo dated January 13, 2022, CC-08 (2022), my office had not received any direct communication about the nature of this Committee from the Managing Director, the Mayor, or the Deputy Managing Director. The first communication that I received was a conversation that Vice Chair Kia'aina raised regarding her potential involvement in the SLFRF Committee. Without any clarity about the scope of the Committee provided directly from the Administration, I was under the impression that the role of the Committee was to broadly discuss strategic oversight of the first tranche of ARPA monies and that Vice Chair Kia'aina would help to advocate for Council priorities on that Committee as it pertained to the broad priorities of how these monies should be allocated.

More recently, and in light of the expiration of the emergency powers on March 5, 2022, we believe that the legal authority of the Administration to unilaterally approve, encumber and expend these monies is questionable.

As discussed in the Committee on Housing and the Economy on March 21, 2022, the Administration is citing proviso 12(n) in the Fiscal Year 2021 Executive Operating Budget to approve and expend the first tranche of ARPA funds, which was approved by the Council in 2020. 12(n) states:

(n) The Council finds that certain funds from the federal government and State government for programs to assist the City with coronavirus-related expenses

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must be received and expended in a timely manner. Such funds include from the Coronavirus Aid, Relief, and Economic Security Act (Pub. Li 16-136), and any other subsequent act or similar act enacted by Congress or the Hawaii State Legislature that may be used to address needs arising from the coronavirus pandemic, or to relieve its impacts. Accordingly, notwithstanding any other section of this ordinance or ROH Section 1 -8.3 and pursuant to Charter Section 13-122, the Council hereby waives Charter Sections 3-204, 9-105. and 9-106, and authorizes and approves the receipt, expenditure, and reprogramming of such funds. Additionally, any corresponding amendments made to any Consolidated Plan or Annual Action Plan, as those terms are defined in ROH Section 1-8.1, that would authorize or reflect the receipt, expenditure, or reprogramming of such funds will be deemed approved and the designated City official shall be deemed authorized to: (i) receive, expend, or reprogram said funds; (ii) execute and submit to HUD any corresponding amendments made to any Consolidated Plan or Annual Action Plan that would authorize or reflect the receipt, expenditure, or reprogramming of such funds; and (iii) execute any incidental or related amendments, agreements, or documents in furtherance of any such amended Consolidated Plan or Annual Action Plan, including, but not limited to, any subrecipient agreements with governmental and nongovernmental subrecipients. The funds approved and appropriated pursuant to this subsection shall not lapse by operation of Charter Section 9-106 and may be received, expended, and reprogrammed for so long as the funds remain available from their source.

With the passage of the budget bills in 2020, the Council waived three provisions of the Revised Charter of Honolulu ("RCH") to apply to the CARES Act. For reference, we are providing the three charter provisions waived below:

Section 3-204. Amendment, Revision or Repeal; Adoption of Codes by Reference –

1. No ordinance shall be amended, revised or repealed by the council except by ordinance. No resolution shall be amended, revised or repealed except by resolution, but a resolution may be superseded by a subsequent ordinance.
2. Any ordinance or resolution may be repealed by reference to its number or section number. Revisions or amendments may be made in the same manner, but the same, or the section, subsection or paragraph thereof, revised or amended, shall be re-enacted at length as revised or amended; but when the amendment consists of adding new sections, subsections or paragraphs or substituting a word, term or number for another word, term or number, it shall be sufficient to enact the new matter alone, if reference thereto is made in the title.

3. Any code or portions thereof may be adopted by reference thereto by the enactment of an ordinance for that purpose. The code or portions thereof need not be published in the manner required for ordinances, but not less than three copies thereof shall be filed for use and examination by the public in the office of the city clerk not less than fifteen days prior to the final reading thereof, and notice of the availability of said copies shall be published by the city clerk.

Section 9-105. Amendments to the Annual Legislative and Executive Budget Ordinances and Executive Program; Other Appropriations –

1. Amendments to the annual legislative budget ordinance may be initiated and considered by the council under the same procedures prescribed for the adoption of the annual legislative budget ordinance, subject to the proviso in subsection 2(a) of this section of the charter.
2. Amendments to the annual executive budget ordinances and program may be submitted by the mayor and considered by the council under the same procedures prescribed for the enactment of the annual executive budget ordinances and adoption of the executive program, provided that: (a) No amendment shall increase the aggregate of authorized expenditures to an amount greater than the estimate of available resources for the fiscal year. (b) Amendments to the capital budget ordinance shall conform to the operating and capital program, as amended.
3. Appropriations for items not included in the annual legislative or executive budget ordinances may be proposed by the council or by the mayor and enacted for the following purposes only: (a) To meet contingencies which could not be anticipated when the budget ordinances were passed. (b) To pay the expenses of holding special elections and elections on proposals to amend this charter. Unless paid for out of current revenues, all amounts appropriated under this subsection of the charter must be included as liabilities of the city in the next succeeding annual legislative or executive budget ordinances. Operating expenses shall neither be appropriated nor paid out of loan funds, except to meet emergencies as declared by the mayor. (Reso. 90-295 and 95-205)

Section 9-106. Administration and Enforcement of the Budget Ordinances --

1. Administration and enforcement of the legislative budget ordinance: Immediately following the enactment of the legislative budget ordinance, the presiding officer of the council shall submit to the director of budget and fiscal services a schedule showing the expenditures of the legislative branch anticipated for each quarter of the fiscal year. The schedule shall not require

the approval of nor can it be altered by the mayor, and the council may proceed without any other authority to incur obligations and make expenditures after the schedule has been submitted. The director of budget and fiscal services shall approve or issue any requisition, purchase order, voucher, warrant or contract, in accordance with the schedule and upon request of the presiding officer of the council. Barring judicial order prohibiting the honoring of any specific requisition, purchase order, voucher, warrant or contract, the director of budget and fiscal services shall process the same for payment within three working days from the date of receipt thereof. Appropriations for the legislative branch shall be considered valid only for the fiscal year for which made, and any part of such appropriation which is not encumbered or expended shall lapse at the end of the fiscal year.

2. Administration and enforcement of the executive operating budget ordinance:
 - (a) The enactment of the executive operating budget ordinance or any supplementary appropriation shall constitute an appropriation of the sums specified therein for the purposes and from the funds indicated. **Such appropriation shall be considered valid only for the fiscal year for which made, and any part of such appropriation which is not encumbered or expended shall lapse at the end of the fiscal year (bolded for emphasis).** Executive agencies authorized to make expenditures under the executive operating budget ordinance may proceed without other authority from the council to incur obligations or make expenditures for proper purposes to the extent that the moneys are available. (b) Immediately following the enactment of the executive operating budget ordinance, the heads of all executive agencies, including the prosecuting attorney and the chair of the ethics commission, shall submit to the director of budget and fiscal services schedules, supported by work programs, showing the expenditures anticipated for each quarter of the fiscal year. (c) The approval of an expenditure schedule by the mayor shall constitute a budgetary allotment which shall, unless a revision thereof is approved by the mayor, be binding upon such agencies. The director of budget and fiscal services shall approve or issue no requisition, purchase order, voucher or warrant that is not in accordance with an allotment. (d) Except as provided in paragraph (e), allotments herein provided may be altered at any time by the mayor. The mayor shall direct appropriate revisions in allotments to keep expenditures within the revenues received or anticipated. (e) The expenditure schedules submitted by the prosecuting attorney and chair of the ethics commission shall constitute budgetary allotments, without the approval by the mayor, which shall, unless a revision thereof is made by the prosecuting attorney or chair of the ethics commission, be binding upon the prosecuting attorney and ethics commission. The director of budget and fiscal services shall approve or issue no requisition, purchase order, voucher or warrant that is not in accordance with an allotment. The allotments herein provided may not be

altered at any time by the mayor. The mayor shall not direct revisions in allotments under this paragraph to keep expenditures within the revenues received or anticipated. (f) Any part of an allotment which is not expended or encumbered shall lapse at the end of the allotment period. (g) The mayor may transfer an unencumbered appropriation balance or portion thereof within the same department only as prescribed by law. Transfers between departments shall be made only by the council by ordinance upon the recommendation of the mayor. (h) The director of budget and fiscal services and the director's surety shall be liable for moneys withdrawn from any operating fund other than in accordance with the executive operating budget ordinance and allotments.

3. Administration and enforcement of the executive capital budget ordinance: (a) **Appropriations authorized in the executive capital budget ordinance or any supplementary appropriation shall be considered valid only for the fiscal year for which made and for twelve months thereafter, and any part of such appropriations which is not expended or encumbered shall lapse twelve months after the end of the fiscal year (bolded for emphasis).** Agencies authorized to make expenditures under the executive capital budget ordinance may proceed without other authority from the council to incur obligations or make expenditures for proper purposes to the extent that the moneys are available. (b) The director of budget and fiscal services shall be responsible for the enforcement of the executive capital budget ordinance to the same extent that the director is responsible for the enforcement of the executive operating budget ordinance. (Emphasis added.)

The authority on which the waiver of these charter provisions is granted is contingent on Charter Section 13-122, which provides the following exemption:

If any provision of this charter jeopardizes the receipt by the city of any federal grant-in-aid or other federal allotment of money, such provision may, insofar as such fund is jeopardized, be waived by the council, after public hearing, upon recommendation of the mayor.

When the proviso language in the Fiscal Year 2021 Budget was contemplated in 2020, the ARPA monies were not contemplated due to the fact that the law was not going to be passed until 2021. At the time, the language was intended to apply to monies from the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), which had a December 2020 deadline at the time the language was contemplated. At the Committee on Housing and the Economy on March 21, 2022, I requested information on how the receipt of ARPA monies would be jeopardized by these monies going through a public hearing process and Council approval, given the four-year life span of these monies and am still awaiting a response. Currently, it is our assessment that RCH 13-122 does not apply because the ARPA funds were not in jeopardy.

Accordingly, given the questionable authority of the Administration to approve funds which may be lapsed at this point, we strongly urge the administration to disband or repurpose the SLFRF Committee. Additionally, please transmit any future proposals that may be funded utilizing the first tranche of ARPA monies to the Council in either a 15-day letter or a resolution pursuant to Sections 12(b) and 12(d) of Ordinance No. 21-20, or be submitted as a communication requesting that it be incorporated into the Fiscal Year 2023 budget which is currently undergoing Council review. I also respectfully request that those monies approved after July 1, 2021 (when the first tranche of ARPA monies were lapsed for operating expenses) that have not yet been encumbered or expended, be submitted to the Council via a 15-day letter for consideration.

Please respond to this memo by April 1, 2022, with an update on the status of the committee and whether the Administration has ceased any further approvals. As always, we welcome the Administration to submit any and all request through the 15-day letter process in Sections 12(b) and 12(d) of Ordinance No. 21-20, resolution, or through the budget process. Mahalo for your continued partnership as we work together to meet the needs of the people of Honolulu.